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IN THE

Supreme Court of the United States

October Term, 1929

No. 356

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

THE PHILIOD LUMBER COMPANY,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

HERBERT W. NAUTS,
Second National Bank Bldg., Toledo, Ohio,
Counsel for Respondent.

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The essential facts of the case are correctly stated in the petition for the writ.

The opinion of the Circuit Court of Appeals for the Sixth Circuit is reported in 33 F. (2d), p. 245.

The sole question presented is whether the assessment of an additional income tax against the respondent for the year 1918 is barred by the statute of limitations, particularly Section 277 (a) (3) of the Revenue Act of 1926 (44 Stat. 58; U. S. C. 26:19:1068-111 (3)), re-enacting the provisions of Section 277 (a) (2) of the Revenue Act of 1924, which provides:

> "The amount of income, excess profits, and war profits taxes imposed by * * * the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period."

The answer to the question depends solely upon whether the document filed by respondent on May 31, 1919, in the office of the Collector of Internal Revenue for the Tenth District of Ohio, was a "return" within the meaning of the statute such as would commence the running of the five-year limitation period.

The Circuit Court of Appeals held that the document filed was such a return, and that the assessment of the additional tax was barred.

ARGUMENT

I

The Decision of the Circuit Court of Appeals Does Not Present a Question of a Character Requiring, as a Matter of Sound Judicial Discretion, Review by This Court.

The decision of the Circuit Court of Appeals is not in conflict with the decisions of this court in the case of *Rock Island, etc., R. R. vs. United States,* 254 U. S. 141, and *Girard Trust Company vs. United States,* 270 U. S. 163, both cited in petitioner's brief.

A comparison of the language of the statutes construed in those cases with the statute here under consideration will show that those decisions are inapplicable to the present case.

In the *Rock Island* case the taxpayer sought to maintain an action to recover back a tax alleged to have been erroneously collected without having first made an appeal to the Commissioner of Internal Revenue for the refundment of the money, in the face of a statute which provided:

> "No suit shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, *until appeals shall have been duly made to the Commissioner of Internal Revenue, according to the provisions of law in that regard,* and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of the Commissioner has been had therein," etc. (Rev. Stat. §3226.)

This court held that since the statute expressly required an appeal to the Commissioner for the refundment of the tax illegally collected, and no such appeal had been made by the plaintiff, the suit could not be maintained. It also held that a claim for the abatement of the tax made before its payment did not constitute an appeal for the refundment of the money, which must be made after payment.

In the *Girard Trust Company* case the taxpayer sought to recover interest on refunded taxes under authority of a statute providing:

> "That upon the allowance of a claim for the refund of or credit for internal revenue taxes paid, interest shall be allowed and paid upon the total amount of such refund or credit at the rate of one-half of one per centum per month to the date of such allowance, as follows: (1) *if such amount was paid under a specific protest setting forth in detail the basis of and reasons for such protest,* from the time when such tax was paid, * * *." (Sec. 1324 (a), Revenue Act of 1921, 42 Stat. at L. 316.)

No "specific protest setting forth in detail the basis of and reasons for such protest" had been made by the taxpayer, and this court therefore decided that the taxpayer was not entitled to the interest claimed under that section of the statute.

In both the above cases the statutes involved provided for the recovery of money by taxpayers conditioned upon their taking certain preliminary steps—in the one case filing an appeal, and in the other a specific protest—which were defined with particularity by the statutes. In both cases the taxpayers had taken certain

other preliminary steps which consisted of acts on their face different from what the statutes specified, and which did not even purport to be the acts specified by the statutes.

On the contrary, in the case under consideration the return filed by the respondent was intended and on its face purported to be exactly what was required by the statute prohibiting an assessment after five years from its filing. It was labelled "Corporation Income and Profits Tax Return for Calendar Year 1918, The Pilliod Lumber Co., Swanton, Ohio." (R., 10.)

II

Reasons Other Than Those Upon Which the Decision of the Circuit Court of Appeals Is Based Bring the Case Within Principles of Law Settled by This Court.

The affidavit executed by the officers of the respondent on September 17, 1923, (R., 10, 11) operated as an amendment and related back to and was effective, for the purpose of the limitation, as of the time of the filing of the return on May 31, 1919.

The affidavit referred to is a statement that the names of the appellant's officers should have appeared on the return, which, to the best of affiants' knowledge and belief, was correct. The contents of the affidavit are set out in full in the findings of fact of the Board (R., 11).

Claims filed in bankruptcy proceeedings, although insufficient in form and substance to fulfill the statutory requirements regarding proofs of claim, may be amended to correct their deficiencies even after the lapse of the